

86-713

No. _____

Supreme Court, U.S.
FILED

OCT 24 1986

JOSEPH E. SPANIOLO, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

JOHN W. STORRS,

Petitioner

v.

MUNICIPALITY OF ANCHORAGE,

Respondent

**PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF ALASKA**

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QUESTIONS PRESENTED FOR REVIEW

1. Is a public employee, who cannot be terminated without just cause, entitled to a meaningful due process hearing before his employment can be terminated?

2. Does an employee who is terminated because of disputed allegations of serious misconduct have a due process right to a termination hearing which affords him the opportunity to confront adverse witnesses and present evidence of his own before a termination decision is made?

3. Is a trial in a state court for breach of an employment contract, which occurs two (2) years after termination, a constitutionally-permissible substitute for a due process termination hearing?

4. Should the right to a due process termination hearing be limited to only those public employees who have the money to retain an attorney and litigate in a court of law?

5. Is a public employee entitled to reinstatement, including an award for back pay and benefits, because of the failure of a municipality to provide the employee with a due process hearing in connection with the termination of employment?

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**PETITION FOR A WRIT OF CERTIORARI TO THE
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Petitioner, John W. Storrs, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of the State of Alaska entered in this proceeding.

OPINIONS BELOW

The memorandum of decision of the State trial court, entered on November 27, 1984, and the judgment entered on January 11, 1985, are unreported. The unreported decision is reproduced in the Appendix A-1. The opinion of the Alaska Supreme Court, as modified on rehearing, is published at 721 P.2d 1146 (Alaska 1986).

JURISDICTION

The opinion of the Alaska Supreme Court was entered on July 11, 1986. A timely Petition for Rehearing was filed by Petitioner, Storrs. The Alaska Supreme Court granted the Rehearing in part, and modified its opinion slightly by an order entered on July 29, 1986. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

Federal Constitutional Provisions

U.S. Const., Fifth Amendment

U.S. Const., Fourteenth Amendment, § 1

The full text of these constitutional provisions are included in Appendix B.

STATEMENT OF FACTS

Until December 1982, John W. Storrs was a career police officer with the Anchorage Police Department. On December 6, 1982, the Department abruptly terminated Storrs' employment. The purported reason for terminating Storrs' employment was an allegation that, while on duty, he had engaged in voluntary sexual relations with an intoxicated female he was transporting to her home from an intersection where she had passed out in her automobile. It is conceded that there was no element of physical force involved. Storrs has, at all relevant times, denied the substance of the allegations, and continues to do so. Unfortunately, prior to his termination, Storrs was never given the opportunity to confront his accusers at a due process termination hearing.

The decision to terminate Storrs was made by Anchorage Police Chief Brian Porter. Mr. Porter testified in deposition that he made his decision based upon a report of an investigating officer, Lieutenant Kevin O'Leary. Police Chief Porter only met with Storrs on one occasion, and that was on the day he discharged him. Chief Porter has testified in deposition that he had already decided to terminate Storrs before he met with him. Police Chief Porter admitted in deposition that an Anchorage Police Officer does not serve at the pleasure of his employer.

The officer can expect continued employment, absent some wrongdoing or violation of rules. An officer may only be terminated for just cause. In all proceedings below, the Municipality of Anchorage has conceded that a police officer may only be terminated for just cause.

Police Chief Porter further admitted in his deposition that he did not conduct a hearing prior to making his decision to terminate Storrs' employment:

Q. Prior to your discharging Mr. Storrs did you conduct any meetings or hearings where the evidence against Mr. Storrs was presented and Mr. Storrs or his representative was given the opportunity to confront and cross-examine those witnesses and present witnesses on his own behalf?

A. I didn't conduct such a hearing, no.

According to the Anchorage Police Chief, the only way that Storrs could have obtained a hearing regarding his termination was via a grievance procedure which was part of the Police Department's collective bargaining agreement with the Anchorage Police Department Employees Association.

The Anchorage Police Department Employees Association (hereinafter referred to as "Union") did not pursue a grievance on Storrs' behalf, even though Storrs requested one. The attorney for the Union admitted in deposition that Storrs had no ability to insist upon arbitration once the Union decided not to demand arbitration.

The Executive Board of the Union had a meeting at which it determined not to pursue a grievance on Storrs' behalf. Storrs was not allowed to be present when the Executive Board heard reports about the alleged incident. The Executive Board meeting was not, and was never intended to be, a termination hearing provided for Storrs'

benefit. During the deposition of the Union attorney, the following testimony was elicited:

Q. Under the procedures of the [Executive] Board, did he [Storrs] have a right to be present during that hearing?

A. Well, as I've indicated, he certainly—well, first of all, it's not a hearing.

Q. Is the—under the procedures that were in existence at the time, is the [Executive] Board meeting a substitute for a—a hearing or an arbitration?

A. No.

Q. Are you aware of any proceedings that were given Mr. Storrs at which he had a right to be represented by counsel or cross-examine witnesses against him?

A. Other than this . . .

Q. Other than this trial.

A. No.

At this time, Storrs will not delve into a discussion of the sufficiency of any evidence regarding the termination. Certainly, it is the Police Department's position that Storrs was terminated for cause. However, the Municipality of Anchorage never provided Storrs with a termination hearing at which evidence could be presented and the sufficiency of that evidence tested. The issue relative to this Petition is whether Storrs should have been given a due process hearing in connection with his termination of employment and, if so, the scope and nature of the hearing which should have been provided.

FEDERAL QUESTIONS RAISED AND DECIDED BELOW

The decision of the Alaska Supreme Court is based, in substantial part, upon the due process clause of the Fourteenth Amendment to the United States Constitution.

Petitioner Storrs commenced this action alleging that his termination of public employment was constitutionally deficient because of the failure of the Municipality of Anchorage to afford Storrs a due process termination hearing. Storrs raised this claim in his complaint, by motion for summary judgment, and on appeal to the Alaska Supreme Court. The Alaska Supreme Court, in its published opinion, directly addressed Storrs' rights under the United States Constitution.

REASONS FOR GRANTING THE PETITION

This case provides the United States Supreme Court with the opportunity to squarely address an issue of national importance which was raised, but not resolved, by this Court in the case of *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985).

The issue was one raised in the concurring opinions of Justice Marshall and Justice Brennan. Is a public employee who is terminated based upon disputed allegations of misconduct "entitled to test the strength of the evidence 'by confronting and cross-examining adverse witnesses and by presenting witnesses on [his] own behalf'" before the decision to terminate that employee's wages is made? (84 L.Ed.2d, at p. 508.) Or, as Justice Brennan framed the issue in his concurring Opinion:

When factual disputes are involved, therefore, an employee may deserve a fair opportunity before discharge to produce contrary records or testimony, or even to confront an accuser in front of the decision-maker. Such an opportunity might not necessitate "elaborate" procedures, see, ante, ———, 84 L.Ed. 2d 506, but the fact remains that in some cases only such an opportunity to challenge the source or produce contrary evidence will suffice to support a finding that there are "reasonable grounds" to believe accusations are "true." (84 L.Ed.2d, at p. 511.)

In *Loudermill*, the Court was not required to address this issue because the petitioners did not raise it or seek relief on this basis. This case, however, clearly puts this issue before the Court for resolution. A decision by this Court could finally put to rest a most troublesome and often-litigated area of the law. For this reason, Petitioner prays that a Writ of Certiorari be issued in this case.

There is little dispute about the essential facts of this case. Storrs was not provided with a meaningful due process hearing prior to his termination. The termination procedure which the Police Department followed gave Storrs no opportunity to defend himself. Lieutenant Kevin O'Leary of the Anchorage Police Department conducted an internal investigation for the Department. O'Leary questioned witnesses, reviewed the scene of the alleged incident, and collected evidence.

Storrs was not allowed to be present when Lieutenant O'Leary interviewed witnesses. Storrs was not allowed to be present when Lieutenant O'Leary investigated the scene of the alleged incident. This means that Storrs was not allowed to have any input into the investigation as it was taking place.

Police Chief Porter decided to terminate Storrs based upon what Lieutenant O'Leary reported to him. Storrs was not allowed to be present when O'Leary presented his case to Police Chief Porter. Both Lieutenant O'Leary and Chief Porter have admitted in deposition that there was never any hearing where Storrs was allowed to confront and cross-examine witnesses. Chief Porter has also admitted in deposition that he had made up his mind to terminate Storrs before ever talking to him.

Storrs submits that an impartial tribunal is basic to a guarantee of due process. If Chief Porter had already made up his mind to terminate Storrs prior to meeting with him, then clearly that one meeting cannot be called

a due process hearing before an impartial tribunal. Further, Chief Porter has admitted to basing his decision to terminate Storrs upon evidence and reports he received outside of Storrs' presence. The very reason for a hearing is to prevent *ex parte* communications and evidence. Evidence must be presented to the finder of fact at a hearing in the presence of the parties, so that the person whose property rights are being infringed upon may confront adverse witnesses, impeach adverse evidence, and present evidence of his own.

Because Storrs was never given a hearing in connection with his termination, he was given no chance to confront and cross-examine any witnesses against him. He was given no opportunity to present evidence of his own to an unbiased finder of fact. He was not allowed to see any witness' statements obtained during the Police Department's internal investigation, and could not, therefore, seek to impeach the evidence that was ultimately used against him. Storrs was denied the basic right to have an impartial tribunal determine the factual issues involved with this case. All that Storrs was given by the Anchorage Police Department was a brief meeting with the Police Chief on the day the Chief fired him. And on that day, Chief Porter had already decided to terminate Storrs.

It has been well-established by this Court that the due process clause of the United States Constitution applies to some types of public employment. *Bd. of Regents v. Roth*, 408 U.S. 56, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972); *Perry v. Sinderman*, 480 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972). Because Storrs was a public employee who could only be terminated for just cause, Storrs has a protected property interest in his continued public employment. *Cleveland Bd. of Education v. Loudermill*, *supra*.

Due process of law requires that, before a valuable property right may be taken or infringed upon by gov-

ernment action, there must be notice and an opportunity to be heard. As noted in *Joint Anti-Fascist Refugee Comm'n v. McGrath*, 341 U.S. 123, 71 S.Ct. 624, 95 L.Ed. 817 (1951) :

[T]he right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society. (341 U.S., at p. 168.)

In this case, Storrs suffered a grievous loss. He lost a good job and a good career. He has been burdened with the stigma of having lost his job as a police officer because of improper sexual activity while on duty. The Anchorage Police Chief has admitted in deposition that Storrs is not eligible for re-hire, and that no other police department would hire Storrs once it became known why the Anchorage Police Department fired him. Storrs is forever precluded from working in his chosen profession. Prior to sustaining this loss, Storrs should have been given a meaningful hearing.

The hearing required by the due process clause of the United States Constitution must be given *before* the deprivation of a property interest occurs. As this Court noted, in *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972) :

If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented. At a later hearing, an individual's possessions can be returned to him if they were unfairly or mistakenly taken in the first place. Damages may even be awarded to him for the wrongful deprivation. *But no later hearing and damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred. This Court has not . . . embraced the proposition that a wrong may be done if it can be undone.* (407 U.S., at pp. 81 and 82.) (Emphasis Added.)

If Storrs was entitled to a due process termination hearing, that hearing should have been conducted prior to taking away his property rights in public enjoyment. The decision of the Alaska Supreme Court in the case below holds that a subsequent lawsuit for breach of contract may be an adequate substitute for a due process termination hearing. However, the fact that a court of law, several years after the fact, might be able to order a public employee reinstated, or order payment of back wages, is not a legitimate substitute for the initial due process hearing. It was the obligation of the Municipality of Anchorage to provide Storrs with a constitutionally-permissible due process hearing. No trial in a court of law can be substituted for that obligation.

The public policy which would result if a trial were allowed to be substituted for a termination hearing would be extremely detrimental. No employer would grant an employee a termination hearing. Instead, the employer would terminate an employee at will, and rely upon the fact that only a small percentage of the employees will have the resources necessary to undertake the time and expense of a court trial. Storrs submits that the right to a due process termination hearing should not be limited to only those employees who can afford the staggering cost of judicial litigation.

In *Cleveland Bd. of Education, supra*, this Court held that an essential principle of due process is that a deprivation of life, liberty, or property be preceded by notice and opportunity for hearing appropriate to the nature of the case. That hearing should be provided *before* a person is deprived of any significant property interest. The opinion of the Court in *Loudermill* notes that the formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings. Storrs submits that the hearing provided must be a meaningful hearing, and that a tenured public employee must be

given a meaningful opportunity to contest the evidence against him, and to present his side of the story. The hearing must be provided at a meaningful time. In most cases, this means that the hearing should be provided prior to termination of employment.

Storrs is willing to concede that there may be rare occasions when a property interest may be infringed upon subject to the provision of a post-termination due process hearing. However, such a hearing should take place quickly.

In this case, Storrs was given neither a pre-termination hearing nor a prompt post-termination hearing. What Storrs was given, under the opinion of the Alaska Supreme Court, was a right to take his case to court and endure the expense and the time-consuming process which makes up formal litigation. As Justice Marshall noted, in his concurring Opinion in *Loudermill*, *supra*, a post-termination hearing is only constitutionally permissible where it occurs promptly:

Were there any guarantee that the post-deprivation hearing and ruling would occur promptly, such as within a few days of the termination of wages, then this minimal pre-deprivation process might suffice. But there is no such guarantee. On a practical level, if the employer had to pay the employee until the end of the proceeding, the employer obviously would have an incentive to resolve the issue expeditiously. The employer loses this incentive if the only suffering as a result of the delay is borne by the wage earner, who eagerly awaits the decision on his livelihood. (84 L.Ed.2d, at p. 509.)

The procedures in place for Anchorage Police Department employees did not provide Storrs with any guarantee of a prompt post-termination hearing. Although a collective bargaining agreement gave Storrs the possibility of arbitrating his discharge, the agreement did not give Storrs the right to demand arbitration. In this case,

despite repeated requests for arbitration, Storrs was refused the opportunity to contest his discharge in that forum. The only avenue of redress left open to Storrs was through the judiciary.

By its very nature, a lawsuit for breach of a contract of employment cannot guarantee that a public employee's dispute will be heard promptly following termination. Further, to require an employee to incur attorney's fees and litigation costs, at the very time his income is cut off, is to impose an unendurable financial burden on that employee. Balancing the interests and hardships of the employer and the employee mandates that the employer afford the employee a meaningful termination hearing either prior to discharge or immediately thereafter. Requiring the employee to file suit and litigate in court is simply not an acceptable substitute for a due process termination hearing.

As Justice Marshall noted, the adequacy of the pre- and post-deprivation procedures are inevitably intertwined. Only a constitutional guarantee that the latter will be immediate and complete can alleviate any concerns about the possibility of wrongful termination of wages where a full and complete pre-termination hearing is not provided.

Justice Brennan wrote, in his concurring Opinion in *Loudermill*, that the Court's decision put to rest any remaining debate over whether public employers must provide meaningful notice and hearing procedures before discharging an employee for cause. Storrs submits that the procedures afforded him in this case did not provide him with a meaningful hearing. Prior to his termination, Storrs was not given the opportunity to test the evidence against him by confronting and cross-examining adverse witnesses or by impeaching the evidence against him. Storrs was not provided the opportunity to have his case heard by an impartial finder of fact who had not already made up his mind based upon *ex parte* communications

and evidence. Serious allegations were levied against Storrs, and Storrs disputed the truth of those allegations. Storrs deserved a fair opportunity before discharge to present his case at a termination hearing where he could also be given the opportunity to confront his accusers and cross-examine witnesses in front of the decision-maker. Absent such a meaningful hearing, a finding that there were reasonable grounds to terminate Storrs cannot be supported.

Storrs believes it is important that a Writ of Certiorari issue in this case. Just as in *Loudermill, supra*, the Court put to rest the debate over whether public employers must provide meaningful notice and hearing procedures before discharging an employee for cause, a decision in this case could put to rest any debate over the nature and scope of the termination hearing which must be provided to a public employee. Termination cases which require a decisionmaker to resolve serious issues of disputed fact should be decided only after a due process hearing where the public employee is afforded the opportunity to confront his accusers, cross-examine witnesses, impeach adverse evidence, and present evidence on his own behalf to a decisionmaker who has not already made up his mind based upon *ex parte* communications and evidence. No other decision would afford an employee the opportunity for a meaningful hearing and determination at a time when the potentially irreparable harm caused by a discharge can still be avoided. To say, as the Alaska Supreme Court has, that a trial occurring two (2) years after termination of employment can be substituted for a due process termination hearing is to say that public employers need no longer provide any meaningful termination hearings.

CONCLUSION

The nature and scope of a due process termination hearing is an issue which has not yet been finally resolved by this Court. For this reason, Petitioner respectfully requests that a Writ of Certiorari be issued, so that this Court may review the Opinion and decision of the Alaska Supreme Court in the above-referenced matter.

RESPECTFULLY SUBMITTED this 27th day of October, 1986.

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APPENDICES

APPENDICES

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APPENDIX A

IN THE
SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

Case No. 3AN-83-4829 Civil

JOHN W. STORRS,

Plaintiff,

v.

MUNICIPALITY OF ANCHORAGE, a municipal corporation,
and ANCHORAGE POLICE DEPARTMENT EMPLOYEES'
ASSOCIATION,

Defendants.

ORDER

Plaintiff has moved for partial summary judgment, asking that judgment be entered in Plaintiff's favor establishing as a matter of law that Plaintiff was not afforded due process because of the failure of Defendant Municipality of Anchorage in giving Plaintiff a pre-termination hearing prior to his discharge. The Court earlier denied Plaintiff's Motion for Summary Judgment and has considered the additional briefing and the record developed since that decision. This order shall serve as a clarification of the earlier order, and shall constitute the law of this case.

The Court orders that Plaintiff's Motion for Summary Judgment is DENIED, and finds as undisputed facts; that Plaintiff was a police officer with the Municipality of Anchorage at the time of his discharge; was represented by a labor organization; that said labor organiza-

tion had a collective bargaining agreement with the Municipality of Anchorage covering Plaintiff's wages, hours and working conditions, and that within said agreement was a provision allowing for the processing of a grievance and arbitration of a discharge of Plaintiff. The Court concludes, based on these undisputed facts, that Plaintiff did not have a constitutional right to a pre-termination hearing. Plaintiff's claims, which were not pursued by his labor organization, are presently set for trial in mid-January, 1985. The primary issue between Plaintiff and Defendant Municipality of Anchorage at the trial will be whether Defendant Municipality of Anchorage breached the collective bargaining agreement wherein Plaintiff could not be discharged except for just cause.

IT IS FURTHER ORDERED that based on Plaintiff's statements on the record on November 15, 1984, motions by the Municipality of Anchorage pertaining to conspiracy and defamation are GRANTED.

IT IS FURTHER ORDERED that issues concerning Plaintiff's character are reserved for ruling at such time at they are offered at trial. Defendants shall follow all applicable rules of evidence pertaining to notice to the Court prior to introduction of said evidence.

IT IS FURTHER ORDERED that Defendant Municipality of Anchorage's Motion pertaining to the admissibility of a polygraph as evidence of just cause for Plaintiff's discharge is PARTIALLY GRANTED. The Court has concluded that the use of the polygraph in this case, limited to the facts of this case only, is not, per se, inadmissible. Provided a proper foundation is laid which tends to show the reliability of the polygraph, and provided that after reviewing the other evidence presented by a Defendant to justify its discharge of Plaintiff, the Court is satisfied that the introduction of the polygraph would not unnecessarily confuse the issues, nor would any unfair prejudicial effect outweigh its probative value,

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and subject to the requirements of the other rules of evidence, said polygraph may be admissible.

DATED this 21st day of November, 1984, at Anchorage, Alaska.

KARL S. JOHNSTONE
Superior Court Judge



APPENDIX B

CONSTITUTIONAL, STATUTORY AND
REGULATORY PROVISIONS INVOLVED

U.S. Const. amend. V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of laws; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.